Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

ORIGINAL

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds | ) | Docket No. 2012-6 CRB CD 2004-2009 (Phase II) (REMAND) |
| | ) | |
| | ) | |
| In the Matter of | ) | |
| | ) | |
| Distribution of 1999-2009 Satellite Royalty Funds | ) | Docket No. 2012-7 CRB SD 1999-2009 (Phase II) (REMAND) |
| | ) | |

SEP 16 2016

Copyright Royalty Board

**INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO THE SDC'S MOTION TO STRIKE AMENDED DIRECT STATEMENT OF INDEPENDENT PRODUCERS GROUP**

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its opposition to the SDC's *Motion to Strike Amended Direct Statement of Independent Producer's Group*.

On August 22, 2016, IPG submitted its Direct Statement in this proceeding. In the aftermath thereof it was found that the calculations placed in the statement were incorrect. Accordingly, on August 31, 2016, IPG filed an Amended Direct Statement. Although the methodology propounded therein was not modified, the correct calculations were substituted for the incorrect calculations, including those for the Devotional and Program Suppliers category.[1]

[1] As a general matter, the IPG percentage allocations for devotional programming were increased, while the IPG percentage allocations for program suppliers decreased.

IPG opposes the SDC motion for the obvious reason that IPG's original calculations were incorrect, and have simply been corrected in IPG's Amended Direct Statement.[2]

On August 26, 2016, the Settling Devotional Claimants filed their *Notice of Consent of 1999-2009 Satellite Shares Proposed by Independent Producers Group, and Motion for Entry of Distribution Order* (the "*Notice of Consent*"). On September 2, 2016, IPG opposed such motion, and on September 9, 2016, the SDC filed its reply brief in support thereof. Notwithstanding, the SDC reply brief was additionally couched as a separate *Motion to Strike IPG's Amended Direct Statement*, and addressed a novel issue with a novel proposed remedy, thereby generating a new pleading process related to such new motion. As a quick review of the SDC reply brief reveals, such pleading primarily addresses the issues of its new motion, and only secondarily addresses the issues related to its original motion.[3]

**A. IPG MADE NO CHANGES TO ITS DISTRIBUTION METHODOLOGY OR AMENDED DIRECT STATEMENT IN RESPONSE TO THE SDC'S "NOTICE OF CONSENT" FILING. THE IPG AND SDC CLAIMED PERCENTAGES FOR 1999-2009 SATELLITE ARE NO LONGER COMPARABLE.**

Throughout its reply brief filing, the SDC assert that IPG's Amended Direct Statement was specifically filed in response to the SDC's *Notice of Consent*. The SDC's claim is rather delusional, giving far more significance to the SDC *Notice of Consent* than IPG ever attributed.

---

[2] "No party will be precluded from revising its claim or its requested rate at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law." 37 C.F.R. § 351.4(b)(3).

[3] As the Judges are well familiar, on several occasions IPG has complained of the SDC raising novel issues in their reply briefs, a practice which mandates disregard of the newly-raised issues and assertions for the obvious reason that the responding party is provided no opportunity to respond. Regardless of the SDC's contention that its new motion was raised as part of a reply brief because it saw the issues in the two motions as related, confusion is injected into the pleading process. As simple cross-reference to a separately filed motion is more commonplace, IPG would request that the Judges direct the SDC in the future to segregate its motions.

Moreover, as the undersigned hereby attests, IPG's preparation of its Amended Direct Statement commenced *prior* to the SDC filing its *Notice of Consent*, and was initiated only after IPG's counsel questioned the figures appearing in the report of Dr. Charles Cowan. See **Exhibit A.** In fact, Dr. Cowan was not even informed about the SDC's *Notice of Consent* until *after* he generated his amended report. Id. Not a single fact suggests that IPG filed its Amended Direct Statement in response to the SDC's *Notice of Consent* and, consequently, not a single fact is cited by the SDC to support the cause-and-effect claim of the SDC.

As IPG's Amended Direct Statement reflects, IPG revised its claimed percentages in both the devotional *and* program suppliers categories so, again, such fact is inconsistent with the SDC's claim that IPG's Amended Direct Statement was filed solely to dislodge the predicate for the SDC *Notice of Consent* relating to the devotional programming category. As IPG's Amended Direct statement also reflects, only nominal changes – typographical errors – were made to Dr. Charles Cowan's description of his propounded methodology. See **Exhibit A.**

Moreover, and as IPG set forth in its opposition to the SDC's *Notice of Consent*, as a motion for distribution such pleading has no merit for several reasons.[4] First, while arguing that the original IPG figures and SDC figures are in the same "zone of reasonableness", the SDC nonetheless opt for the lower figures, giving rise to an issue of whether IPG could simply file a countervailing "Notice of Consent" to accept the SDC figures, leaving the Judges to determine which it will apply based on no underlying confirmation or vetting of the methodologies on which such figures are based. That is, there is no logical significance to the SDC's *Notice of Consent* unless the SDC agree to the distribution of its own higher figures. Second, while any distribution based on IPG's original figures must logically be based on IPG's assertion of its

[4] See generally, *IPG Opposition to the Settling Devotional Claimants' Motion for Entry of Distribution Order* (filed Sept. 2, 2016).

methodology, the SDC cannot *effectively* elect that such methodology apply for satellite pools and not cable pools when the identical methodology is being advocated.[5]

Most significantly, however, it would be reversible error for the Judges to adopt the original figures proposed by IPG simply because they were comparable to the figures proposed by the SDC. To be clear, in the SDC's appeal of the 2000-2003 cable proceedings, in order to challenge a *nominal* or *non-existent* differential between the IPG and SDC advocated figures for two royalty pools, the SDC challenged the Judges' award and prevailed.[6] Both IPG and the CRB opposed such position and lost. The ruling clearly set forth by the Court of Appeals for the District of Columbia, a ruling that was propounded *by the SDC*, is that the Judge's distribution orders must be based upon a specific adopted methodology, and cannot simply adopt the figures of parties even if the methodological results of the parties come to the identical conclusion. *Settling Devotional Claimants v. Copyright Royalty Board*, et al., U.S.C.A. Case No. 13-1276 at pp. 23-27 (D.C. Cir. 2015)(Aug. 14, 2015). So to speak, the SDC's chickens have now come home to roost.[7] The SDC attempt to distinguish such ruling by asserting that Section 801 of the

---

[5] Notably, the SDC challenge that acceptance of figures tied to a particular methodology do not reflect or require acceptance of such methodology. Such contention would be reasonable but for the SDC's argument to the Court of Appeals in the 2000-2003 cable proceedings that a particular methodology must be accepted, regardless of the similarity of proposed results by "happenstance or otherwise".

[6] For the 2000 cable royalty pool, the SDC argued that IPG should receive 25.5%-39.1% of the pool, while IPG advocated 37.14% of the pool. IPG was awarded 37.14%, squarely within the SDC range. For the 2002 cable royalty pool, the SDC argued that IPG should receive 32.5%-38.1%of the pool, while IPG advocated 41.02% of the pool. IPG was awarded 41.02%, less than three percentage points from the SDC range. See *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, at 65004-65005 (Oct. 30, 2013).

[7] Nothing shy of the term "hypocritical" can be applied to the SDC's divergent positions when comparing its appeal of the Judges' 2000-2003 cable distribution, and its position herein. In its attempt to distinguish the Court of Appeals determination, the SDC assert that such opinion "simply held that there must be substantial evidence to support the Judges' adoption of a methodology for distribution when there is a dispute over the results." However, there was, at

Copyright Act provides that if there is no controversy as to the figures advocated by the parties, the Judges could distribute funds pursuant to such figures, but such position was squarely opposed by the SDC in its filings with the Court of Appeals, arguing that the parties' figures must align *and* there must be an agreement of settlement amongst the parties for Section 801 to apply. See *Reply Brief of Settling Devotional Claimants In Support of Appeal from Orders of the Copyright Royalty Judges* at pp. 9-18, Case Nos. 13-1274, 13-1276, 13-1296 (Oct. 7, 2014).

Further lacking in the SDC brief is any rational explanation as to why IPG would object to the SDC *Notice of Consent* and instead opt to litigate the 1999-2009 satellite proceedings for the devotional category if IPG sought effectively the same distribution. Specifically, the SDC assert that IPG has "retroactively manufacture[d] disagreement". The only proffered explanation is for IPG:

> "to prolong unnecessarily these proceedings in spite of the SDC's consent to IPG's original satellite proposal – possibly for the purpose of obtaining settlement leverage in other proceedings, or for other ulterior motives."

SDC motion at p. 2.

The SDC also claim that the IPG Amended Direct Statement:

> "[provided] IPG an unfair advantage in this litigation by inducing the SDC to consent to figures that it then changed."

SDC motion at p. 8.

---

best, a nominal or no "dispute over the results" for two royalty pools in the 2000-2003 cable proceedings, so the SDC's statement of the holding is profoundly incorrect.

The obvious question is why in the 2000-2003 cable proceeding the SDC did not accept the 2000 and 2002 awarded distributions according to the percentages that *both* IPG and the SDC advocated, but instead zealously challenged the awards. Regardless of the SDC's motivation, the SDC takes a contradictory position herein, and states that "If there is no controversy over the results, there is no need for the Judges to decide between methodologies." SDC reply/motion at pp. 6-7.

What "leverage"? What "ulterior motives"? What "advantage"? The statements are so far-fetched that even the SDC's imagination cannot contrive a reason why IPG would submit revised claim percentages, all of which will be immediately validated or invalidated by submitted data, to delay the distribution of royalties for which IPG otherwise would not take dispute. Such a "strategy", if such description can even be used", would only unnecessarily require litigation of matters that are not in issue. The more obvious and simple answer is that already offered by IPG and Dr. Cowan – the methodology remains unchanged, but the presented results were simply in error and were being corrected.

All of the foregoing arguments apply *even if* IPG had not revised its claimed percentages in both the devotional and program suppliers categories. Notwithstanding, IPG did file an Amended Direct Statement, thereby nullifying the SDC assertion that the parties were in agreement as to their percentage figures. The IPG Amended Direct Statement makes no substantive change to its proposed methodology, and only a change to its claimed percentages. As is expressly allowed by 37 C.F.R. § 351.4(b)(3), percentage claims may be revised "during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law." See infra.

### B. THE DIFFERENCES BETWEEN IPG'S DIRECT STATEMENT AND AMENDED DIRECT STATEMENT WERE FEW AND OBVIOUS, AND WERE UNRELATED TO THE SUBMISSION OF A NEW DISTRIBUTION METHODOLOGY.

Throughout the SDC's motion, the SDC repeatedly asserts that IPG's Amended Direct Statement submits a new distribution methodology. Such is not remotely the case. See generally, Decl. of Dr. Charles Cowan, **Exhibit A**. A quick comparison of IPG's Direct Statement and Amended Direct Statement reflects the differences therein, none of which relate to

a revision of IPG's propounded distribution methodology. The aggregate of such differences are as follows:

1) The introductory portion of IPG's Direct Statement indicated that IPG was making claim for the figures that appear in the attached report authored by Dr. Charles Cowan. *See* IPG WDS at p. 2 ("IPG hereby makes claim to the percentage of royalties set forth in the attached report of Dr. Charles Cowan."). By contrast, the introductory portion of IPG's Amended Direct Statement (which also attached the report of Dr. Cowan) simply *repeated* the specific figures that appear in Dr. Cowan's report. *See* IPG AWDS at pp. 2-4. No other revisions to IPG's introductory pleading were made.
2) Dr. Cowan's amended report remedies two typographical errors. The first erringly referred once to "IDC" rather than "IPG". *See* Cowan report at p.8, para. 34. The second, appearing in the same paragraph, erringly omitted a parentheses ["( )"] that otherwise appeared in a mathematical calculation identified by Dr. Cowan. Id.
3) Dr. Cowan's amended report substituted the results of the correct calculations from Dr. Cowan's methodology. *Cf.* IPG WDS at pp. 9-12 *with* IPG AWDS at pp. 9-12. In connection therewith, it was additionally discovered that Dr. Cowan had incorrectly pasted the results of applying a prior IPG methodology, presented as "Alternative Estimates".[8] Specifically, while Dr. Cowan described his application of a prior IPG methodology modified to address the Judges' criticisms thereof, and submitted "Estimates of Relative Distributions for Devotional and Program Suppliers, Using Previous IPG Methods", the pasted tables only included the cable proceeding figures, and

[8] Notably, the figures appearing as Alternative Estimates are not the percentages sought by IPG in either its Direct Statement or Amended Direct Statement, but reflect information that the Judges may find significant to their determination.

were further mislabeled as relating to the devotional programming category even though both SDC and MPAA percentages were identified. Dr. Cowan's amended report remedied this cut-and-paste error.[9]

4) Appendix 2 to Dr. Cowan's report adds an inconsequential observation about the regression formula that was utilized.[10]

Regardless of such nominal defined changes, the SDC inexplicably assert that IPG has "[hidden] its changes behind a wall of mumbo jumbo." SDC motion at p. 4. IPG remains unclear as to what the SDC even refers, as IPG has quite clearly identified the handful of changes, both herein as well as in its previously-filed opposition to the MPAA motion to strike IPG's Amended Direct Statement. No discussion regarding any methodology exists in the introductory pleading that is part of either IPG's Direct Statement or Amended Direct Statement. All methodological discussion and description appears unchanged in Dr. Cowan's report.

Notwithstanding, the SDC submit the declaration of Dr. Erdem that summarily asserts that he does not consider the change as a correction of an error, but as a change in methodology. By contrast, Dr. Cowan *substantively* addresses such contention in his declaration, noting that the corrected formula expression merely changes the *scale* of the same variable expressed in the originally expressed formula, which is *not* a methodological change. As noted in Dr. Cowan's declaration, "scaling merely reflects how the data is considered by the regression, i.e., how the

---

[9] IPG's counsel did not review or consider Dr. Cowan's report prior to its submission to expressly avoid any allegation that IPG had "straitjacketed" its witness, an allegation twice asserted by the Judges against IPG. Ironically, the testimony of both SDC and MPAA witnesses reflect a myriad of references indicating the involvement of SDC and MPAA counsel in the preparation of such reports.

[10] Appendix 2, at p. 21: "A similar result is found when the natural logarithm of Y is used as the dependent variable, except that changes are now expressed as proportional changes."

*ma is* counted then applied - - in absolute terms or in proportional terms." Quite simply, Dr. Erdem exaggerates the characterization and import of the correction to the report submitted by Dr. Cowan, for the ultimate purpose of imposing IPG's acknowledged incorrect calculations for correct calculations.

### C. IPG'S AMENDED DIRECT STATEMENT WAS SUBMITTED PRIOR TO THE DEADLINE FOR THE SUBMISSION OF INITIAL DISCOVERY, AND THE SDC HAS ALREADY PROPOUNDED DISCOVERY RELATING TO IPG'S AMENDED DIRECT STATEMENT. THE SDC CAN IDENTIFY NO PREJUDICE.

Despite the fact that the foregoing differences between IPG's Direct Statement and Amended Direct Statement are fairly apparent, the SDC complain that IPG did not identify such changes as part of its submission, and that the SDC has been harmed by its inability to formulate discovery requests.

IPG's Amended Direct Statement was submitted a mere days after its Direct Statement, and even prior to the SDC's submission of initial discovery requests. Having been filed prior to the SDC's issuance of discovery, and certainly prior to IPG's response to discovery, the SDC is hard-pressed to articulate any prejudice. Further, the SDC neglects to mention that the SDC's discovery requests actually sought the production of documents relating to the figures appearing in *both* IPG's original and amended direct statements, meaning that no prejudice can possibly inure to the SDC. *See* **Exhibit B**, at request no. 1, and throughout. Moreover, if the SDC believed that any prejudice would result from its inability to determine the differences between the IPG Direct Statement and Amended Direct Statement, such prejudice could have been avoided by the SDC with a simple phone call to inquire as to such differences, or a request for additional time to prepare written discovery. Both requests would have been accommodated.

### D. IPG HAS COMPLIED WITH THE COPYRIGHT ROYALTY BOARD REGULATIONS.

In its challenge to the IPG Amended Direct Statement, the SDC cites to 37 C.F.R. § 351.4(c) to argue that IPG's filing should be bounced for failure to articulate the changes that were made to the direct statement. Conveniently omitted, however, is reference to the immediately preceding provision, falling under a different subsection. As set forth therein:

> "No party will be precluded from revising its claim or its requested rate at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law."

37 C.F.R. § 351.4(b)(3).

As noted above, IPG has not submitted a revised methodology, but merely corrected its calculations under its submitted methodology, squarely placing such amendment or revision within the ambit of the regulation set forth above.

By contrast, the opening phrase of the provision cited by the SDC reads: "A participant in a proceeding *may* amend a written direct statement *based on new information received during the discovery process* . . . ." 37 C.F.R. §351.4(c) (emphasis added). By its plain language, the provision is permissive, not restrictive, and recites the technical requirements for amended direct statements filed as a result of information "received during the discovery process". That is, the provision does not assert that revision or amendment to a claim amount is *precluded* unless based on "information received during the discovery process", which would stand in stark contradiction of Section 351.4(b)(3) where "amendment" is merely a revision of the claimed percentage.

IPG did not construe the requirements set forth in §351.4(c) as applicable to "revisions" of a claim pursuant to §351.4(b)(3) and, as noted, such claim revisions fall under a different subsection of the regulations. For this reason, IPG could have just as validly submitted a pleading entitled "Revision of Claims" rather than "Amended Direct Statement", further

demonstrating the form over substance challenge brought by the SDC. Regardless, if the §351.4(c) requirements were to *strictly* apply to IPG's revised claim percentages, IPG complied with all of them other than providing a description of the nominal textual differences between IPG's Direct Statement and Amended Direct Statement, which IPG has provided herein and in a prior pleading. See supra. Additionally, IPG technically received its information, i.e., knowledge of its miscalculation, "during the discovery process". Consequently, even if the requirements set forth in §351.4(c) were to apply to "revisions" of a claim pursuant to §351.4(b)(3), IPG has complied. Again, the SDC fail to articulate what prejudice it has suffered.

### E. THE MOTIVATION OF THE SDC (AND MPAA) ARE TO PRECLUDE THE JUDGES' RECEIPT OF INFORMATION SPECIFICALLY RESPONSIVE TO THE JUDGES' REQUESTS FOR SHAPLEY ANALYSES. NO TECHNICAL MISSTEP EXISTS OR, IF EXISTENT, COULD NOT BE REMEDIED. NO PREJUDICE HAS INURED.

As noted in his declaration, the figures presented by Dr. Cowan are specifically responsive to the Judges' request for a Shapley Valuation analysis. The SDC's motion to strike, and the MPAA's motion to strike, should be revealed for what they are – a shallow attempt to challenge the filing of IPG's Amended Direct Statement simply to preclude Dr. Cowan's presentation of different percentage claims.

The SDC (and MPAA) assert technical challenges that (even if applicable, which they are not) have no consequence because they are capable of remedy, i.e., the amended statement did not articulate the differences from the initial statement. The SDC (and MPAA) assert that they have been prejudiced in discovery, even though the Amended Direct Statement was filed sufficiently prior to the SDC's and MPAA's submission of their initial discovery requests in order for *both* parties to request documents underlying the Amended Direct Statement. The SDC

argues for some inarticulable advantage that IPG has received by submitting the corrected figures. The bottom line is that Dr. Cowan has attested that he did not revise his propounded methodology, that there was no intention of revising his propounded methodology, and the purpose of the Amended Direct Statement was to replace incorrect calculations with correct calculations. See **Exhibit A.**

What neither the SDC nor the MPAA address, *anywhere*, are the CRB regulations relating to the revision of percentage claims, which is all that can be demonstrated to have occurred: "No party will be precluded from revising its claim or its requested rate at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law." 37 C.F.R. § 351.4(b)(3). To this fact, neither the SDC nor the MPAA have provided a response.

## CONCLUSION

For the foregoing reasons, the SDC's *Motion to Strike Amended Direct Statement of Independent Producers Group* should be denied in its entirety.

Respectfully submitted,

Dated: September 15, 2016

_____/s/_____
Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213)624-1996
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Independent Producers Group

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2016, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

/s/
Brian D. Boydston

**MPAA REPRESENTED PROGRAM SUPPLIERS**

Gregory O. Olaniran, Esq.
Lucy Holmes Plovnick Esq.
Mitchell, Silberberg & Knupp LLP
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036

**SETTLING DEVOTIONAL CLAIMANTS:**

Clifford M. Harrington
Matthew MacLean
Pillsbury, Winthrop, et al.
P.O. Box 57197
Washington, D.C. 20036-9997

# EXHIBIT A

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds | ) | Docket No. 2012-6 CRB CD 2004-2009 (Phase II) (REMAND) |
| | ) | |
| In the Matter of | ) | |
| | ) | |
| Distribution of 1999-2009 Satellite Royalty Funds | ) | Docket No. 2012-7 CRB SD 1999-2009 (Phase II) (REMAND) |
| | ) | |

**DECLARATION OF DR. CHARLES COWAN**

I, CHARLES COWAN, swear under penalty of perjury, that the following is true and correct:

1. I am over twenty-one years of age, am of sound mind and suffer from no legal disabilities. I am fully competent to testify to the matters set forth in this declaration. I have personal knowledge of all the facts stated herein and am in all respects qualified to assert the same. The contents of this declaration are true and correct.

2. In the Motion to Strike, the Settling Devotional Claimants ("SDC") assert that in my amended report, I submit a new methodology.

3. The SDC's conclusion is incorrect - what I submitted was not a "new methodology", and the revised allocation share proposals are the results of a correction to the data made in the one week between the initial submission and the subsequent submission.

4. The methodology I used was well explained in the first submission, dated August 22. It is a methodology that has never been presented to the court, yet which directly responds to

the court's desire to base the allocations on the marginal value of programs. This methodology is a standard application of regression theory, where the coefficients of variables included in the regression are interpreted as the hedonic marginal values of programs offered by each of the parties in this proceeding.

5. The regression method I used in the later calculations is exactly the same. The variables I used are exactly the same. Subscriptions are on the left hand side of the equation, while the number of programs offered by each of the parties on the right hand side, plus controls for time in years and for the stations offering the programs.

6. As I noted in the appendix to my report, the coefficients in the regression are the percentage change in subscriptions due to a unit change in the number of programs offered by a party in the proceeding. This is an application of regression in econometrics that has been in use since the middle of the last century - for over 50 years. Accordingly, since the regression method being used, the variables being used, and the data sources being used are exactly the same, the assertion that different discovery requests are required is misleading to the court, and discovery relating to the methodology would be unchanged under either submission.

7. The text of the two submissions, dated August 22 and August 30, are identical in terms of explaining that a regression was being used, the same variables included in the regression, and the interpretation of the coefficients. The changes between the two texts are nominal, remedy typographical errors, and add a sentence in Appendix 2 that is an inconsequential observation about the regression formula.

8. The August 22nd submission included all the descriptions, mathematics, and rationale that was needed by any party to interpret what was being done, and discovery on the initial and subsequent submission would be form wise and substantively identical. The identical

nature of the submitted methodology can be readily evaluated by the court by simply holding up and comparing the two texts.

9. Dr. Erdem acknowledges this in his declaration. In paragraph 4 of his declaration he demonstrates that the two equations are identical, except for a change in the *scaling* of the dependent variable "Subscribers" that results from the use of a logarithm. Dr. Erdem is correct that the revised formula reflects a revision to the *scale* of the same variable expressed in the originally expressed formula, however that is *not* a methodological change. Rather, scaling merely reflects how the data is viewed by the regression, i.e., how the data is counted then applied - - in absolute terms or in proportional terms. Moreover, this concept of scaling, which in no way involves a methodological change, is not a recent concept, and is even described in a 1938 reference book regarding the use of mathematics in economics. For example, see Allen, R.G.D. Mathematical Analysis for Economists, St. Martin's Press, New York, 1938, pages 219-220:

> *"equal distances between points on a natural scale indicate equal absolute changes in the variables, and equal distances between points on a logarithmic scale indicate equal proportional changes in the variable".*

I chose this particular reference because it dates back to 1938 when this book was first published; the scaling of a variable is well-known to economists, it is not a change in methodology despite the claim of Dr. Erdem, and Dr. Erdem undercuts his own claim by presenting two identical forms of the regression in his report, where all variables are identical, the regression methodology is identical, and the predictor variables are unchanged.

10. Finally, Dr. Erdem would have to agree that the functional form of a variable included in the analysis is dictated by the data being analyzed. With a correction to the data that drove the resubmission of the report, Dr. Erdem would be complaining that I did not consider the

distribution of the corrected data being analyzed. In short, Dr. Erdem would like to claim I changed methodologies when I didn't, but he would also like to have the opportunity to complain that I paid no attention to the form of the data that was ultimately analyzed. This is a ploy to attack the analysis before he has performed any review of the data or the actual analysis conducted, since no discovery materials have even been produced to date. Dr. Erdem's conclusion in paragraph 6 of his declaration, that this is a "change in methodology" is belied by his own presentation of the same equations and the description in standard economics texts that the logarithm is a change of the scale of a variable to facilitate comparisons along that scale.

11. The more relevant question is why were there changes to the allocations and the data. The answer is simple - after preparation of the August 22nd report, IPG's counsel immediately inquired about the produced results, and during the course of the next week I discovered errors in the earlier processing of the data. Consequently, in the tabulations and analyses I performed for the August 22nd report, inconsistencies existed that called into question the produced results, which required remedy. All of this was in the process of being performed and corrected prior to a pleading filed by the SDC entitled *Notice of Consent of 1999-2009 Satellite Shares Proposed by Independent Producers Group, and Motion for Entry of Distribution Order.* None of my calculations were made in response to such pleading, nor are affected by such pleading. Until earlier this week (and well after the submission of the corrected

analysis) I was not even aware of the pleading filed by the SDC, so I clearly could not have performed an analysis in response to their pleading.

DATED: September 13, 2016

By: _____

Dr. Charles Cowan

# EXHIBIT B

pillsbury

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

Matthew J. MacLean
tel 202.663.8183
matthew.maclean@pillsburylaw.com

September 1, 2016

Brian D. Boydston
Pick & Boydston, LLP
10786 Le Conte Ave.
Los Angeles, California 90024

Re: *Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and Docket No. 2012-6 CRB SD 1999-2009 (Phase II) Settling Devotional Claimants' Document Production Requests in connection with Independent Producers Group's Written Direct Statement in Reopened Proceedings*

Dear Mr. Boydston:

The Settling Devotional Claimants hereby submit the following discovery requests in the above-referenced Docket (hereinafter the "Proceeding").

**Instructions**

Please repeat each of the requests below on your response. Please provide a separate written response to each request. If you object to any request, state each basis for your objection in sufficient detail so as to permit adjudication of the validity of the objection, and produce any documents responsive to the portions of the request that are not objectionable. If you claim a document is "privileged," please state every fact supporting your claim of privilege. Selection of documents from files and other sources, as well as the numbering or identification of such documents for purposes of this production, shall be performed in such a manner as to ensure that the source of each document may be determined, if necessary. In particular, in the event that documents are used in sequence with other documents to produce a result, the documents should be produced in such order, or the order of sequence used stated so as to permit replication of the results. Further, if any documents that you produce are contained in file folders with tabs or labels identifying such documents, you are requested to produce such folders, tabs and/or labels intact with such documents. Documents otherwise attached to each other should not be separated for purposes of this production. Any electronic record or computerized piece of information should be produced in an intelligible format or should

include a description of the system and/or program from which each was derived sufficient to permit rendering the material intelligible.

**Definitions**

The following shall apply to all requests:

a. the singular of each word shall be construed to include its plural and vice versa;
b. "and" as well as "or" shall be construed both conjunctively as well as disjunctively;
c. "each" shall be construed to include "every" and vice versa;
d. "any" shall be construed to include "all" and vice versa;
e. "including" shall be construed as "including without limitation"; and
f. the present tense shall be construed to include the past tense and vice versa.

The term "underlying" has the same meaning as in 37 C.F.R. § 351.6, and includes, without limitation, all documents upon which the witness relied in making his or her statement and all documents that verify bottom-line numbers.

"Regarding," "relating to," "addressing," or "showing" when used herein means, in whole or in part, constituting, relating to, embodying, containing, evidencing, reflecting, reciting, identifying, stating, recording, supporting, refuting, referring to, or in any way being relevant, directly or indirectly to the subject.

"Supporting" or "support" means, in whole or in part, relating to the basis for a statement or assertion, and includes documents that might tend to refute the statement or assertion.

"Mr. Galaz" means Raul C. Galaz.

"Dr. Cowan" means Charles D. Cowan, Ph.D.

The term "document" means and includes all materials comprehended within the description of the term "document" contained in Rule 34 of the Federal Rules of Civil Procedure and means the original and all drafts of a writing, as that term is defined by Rule 1001 of the Federal Rules of Evidence, including, without limitation, all written, recorded, graphic or photographic matter, however produced or reproduced, of every kind and description in your actual or constructive possession, custody, care or control pertaining in any manner to the subject matter indicated and includes, without limiting the generality of the foregoing, originals (or copies where originals are not available) and drafts, all papers, letters, notes, memoranda, correspondence, telegrams, cables, photographs, microfilm, prints, recordings, transcriptions, blueprints, drawings, paper,

books, accounts, objects, notes or sound recordings of any type of personal or telephone conversations or meetings or conferences, minutes of directors or committee meetings, other minutes, interoffice communications or correspondence, reports, studies, written forecasts, projects, analyses, contracts, licenses, invoices, charge slips, expense account reports, hotel charges, receipts, agreements, ledgers, journals, books of account, vouchers, bank checks, freight bills, working papers, drafts, statistical records, cost sheets, abstracts of bids, stenographers' notebooks, calendars, appointment books, telephone slips, diaries, time sheets or logs, job or transaction files, computer printouts or papers similar to any of the foregoing however denominated. A draft or non-identical copy is a separate document within the meaning of this term. The term "document" also refers to electronic records in the form of electronic mail, computer files and the like without regard to whether the electronic record exists in printed form.

## DOCUMENT REQUESTS

1. All documents which underlie, relate to, support or form the basis for the statement in the Expert Report of Charles D. Cowan, Ph. D. ("Cowan Report") and the Amended Expert Report of Charles D. Cowan, Ph. D. ("Amended Cowan Report") that, "I have been retained by Pick & Boydston to develop a methodology for estimating values for programs/sets of program for different third party television show providers for use by the Copyright Royalty Board in its determination of allocation of royalties."

2. All documents which underlie, relate to, support or form the basis for the statement of Dr. Cowan in the Cowan Report and the Amended Cowan Report that, "I was also asked to review past methodologies employed and data provided to determine their utility."

3. All documents, reports, analyses or other material which reflect, relate to, or form the basis for any conclusions reached by Dr. Cowan as to the utility or accuracy of past methodologies employed by IPG in proceedings before the Copyright Royalty Board.

4. All documents, data, and source material that Dr. Cowan considered that underlie, relate to, support or form the basis of, or in the alternative undermine or dispute all facts, conclusions, and/or opinions contained in the Cowan Report and the Amended Cowan Report.

5. All data provided to Dr. Cowan, as referenced in paragraph 2 of the Cowan Report and the Amended Cowan Report.

6. All documents showing the source of the data that Dr. Cowan was provided (Cowan Report and Amended Cowan Report, at ¶ 2), including who selected, compiled, and provided him with the data.

7. All documents underlying the statement: "I developed a methodology that is directly responsive to what is my understanding of the valuation required for these

analyses, similar to methods I have used in the past." (Cowan Report and Amended Cowan Report, ¶ 3.)

8. All documents, rulings, past submissions by "Plaintiffs and Defendants" and econometric literature on the topic of allocations of royalties which Dr. Cowan states he has read prior to preparation of the Cowan Report (Cowan Report and Amended Cowan Report, ¶ 6).

9. All documents underlying Dr. Cowan's statement that the method he adopted is a "commonly used method." (Cowan Report and Amended Cowan Report, ¶ 10.)

10. All documents underlying the "set of estimates that relies on a calculation that the Judges have accepted in past hearings," referenced in paragraph 10 of the Cowan Report and Amended Cowan Report.

11. All documents underlying the statement "There is a mechanism that the CSO has to be following to determine the value of the station. The mechanism is unknown, which is why we need to estimate what the values are for programs in the bundle." (Cowan Report and Amended Cowan Report, ¶ 13.)

12. All documents underlying the statement, "[W]hile there is likely some variation in value to CSO to CSO about the value of different titles, the value cannot vary in an extreme manner, since that would create an extreme demand for some stations that are offering the popular titles, and thus the title would be omnipresent." (Cowan Report and Amended Cowan Report, ¶ 14.)

13. All documents underlying the statements, "The CSO is indifferent to viewership of a particular program ...," and "[V]iewership cannot be important to the decisions of the CSO ...." (Cowan Report and Amended Cowan Report, ¶ 16.)

14. All documents underlying the statement, "If viewership of a particular program were important to the CSO, the CSO would put terms in the licensing agreement to allow it to have a say in whether the time or the offering of a station were to be changed." (Cowan Report and Amended Cowan Report, ¶ 16.)

15. All computations and all documents that underlie the results set forth in each table contained in the Cowan Report, including but not limited to "the voluminous data provided to me" (Cowan Report ¶ 30) and the modified alternative estimates Dr. Cowan was asked to consider.

16. All computations and all documents that underlie the results set forth in each table contained in the Amended Cowan Report, including but not limited to "the voluminous data provided to me" (Amended Cowan Report ¶ 30) and the modified alternative estimates Dr. Cowan was asked to consider.

17. All documents related to any computation of confidence intervals conducted in connection with any witness's methodology in this case.

18. All reference materials Dr. Cowan relied upon, including the pages cited on page 21 of the Cowan Report and the Amended Cowan Report.

19. All documents relating to any changes between the Cowan Report and the Amended Cowan Report, and the reasons for those changes, including all communications with Dr. Cowan and notes of communications with Dr. Cowan in which any changes or reasons for changes were discussed.

Sincerely,

/s/
Matthew J. MacLean
*Counsel for Settling Devotional Claimants*